No. 74-6212

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

GREGORY NORTON, JR., APPELLANT

v.

CASPAR W. WEINBERGER, SECRETARY OF
HEALTH, EDUCATION, AND WELFARE

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MARYLAND

MEMORANDUM FOR THE APPELLEE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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STATEMENT

1. This suit challenges the constitutionality of Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Social Security Act, 42 U.S.C. 402(d)(3) and 416(h)(3)(C)(ii), insofar as those provisions condition certain illegitimate children's receipt of child's insurance benefits upon a showing that a deceased male wage-earner was their father and was, at the time of his death, living with them or contributing to their support.

Child's insurance benefits are payable to children under the age of 18 (or, in the case of full-time students, under the age of 22) who were dependent upon the deceased wage-earner at the time of his death. Section 202(d)(1)(C) of the Act.[1/] Dependency upon a deceased father is presumed in the

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1/ The pertinent statutory provisions are set forth in the appendix to J.S. App. C.

case of legitimate children who have not been adopted by another man. Section 202(d)(3) of the Act. Such dependency is also presumed in the case of an illegitimate child (1) whose parents went through a marriage ceremony that was rendered invalid by a non-obvious legal impediment or (2) whose father (a) acknowledged his paternity in writing, (b) had been decreed by a court to be the child's father, or (c) had been ordered by a court to support the child. Sections 202(d)(3) and 216(h)(2) and (3) of the Act.

Children not falling in any of the above categories, i.e., legitimate children who have been adopted by another man and other illegitimate children, are not presumed to have been dependent upon their fathers. In order to receive child's insurance benefits, such children must show that the deceased wage-earner was their father and that, at the time of his death, the wage-earner had been living with them or contributing to their support. Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Act.

2. Appellant, Gregory Norton, Jr., filed a claim for child's insurance benefits upon the death of Gregory Norton, Sr. The claim was tried initially by a hearing examiner of the Department of Health, Education, and Welfare. Appellant conceded that Gregory Norton, Sr., was not his legitimate father. His principal contention was that "the deceased wage earner was [his] biological father * * * and that [he] * * * was living with or being supported by the father at the

father's death" (App. 11).[2/] The hearing examiner found that the evidence clearly established that Gregory Norton, Sr. was appellant's father but that the deceased father had not been living with his son at the time of death (App. 12). The critical issue considered by the hearing examiner was whether the deceased father had been contributing to appellant's support.

There was no evidence that the deceased father had significantly contributed to appellant's support. Appellant's case rested in large part upon the claim that the father, a combat soldier, had been in the process of obtaining a military pay allotment for his son at the time of his death. There was evidence that the father had written Mrs. Mary R. Evans, stating that he knew appellant was his son and requesting appellant's mother's address so that she could send him appellant's birth certificate, so that he could designate appellant as the beneficiary of his military insurance policy (App. 49, 87). The hearing examiner "acknowledge[d] that the wage earner in a letter asked for the birth certificate of the child and that record of birth was found with his personal effects" (App. 13). However, appellant's claim was denied because "[n]o allotment of support was made by Gregory B. Norton on behalf of Gregory B. Norton, Jr. prior to [the] date of his death, May 19, 1966" (ibid.).

2/ "App." refers to the bound appendix in the district court, a copy of which is being lodged with the Clerk of this Court.

3. Appellant then brought this class suit in the United States District Court for the District of Maryland for review of the denial of benefits. Appellant contested the finding that the deceased father was not contributing to appellant's support and alternatively asserted that Congress' failure to extend the presumption of dependency to all illegitimate children denied equal protection of the law. He requested declaratory and injunctive relief on behalf of himself and all persons similarly situated.

A single-judge district court determined that the administrative denial of benefits was supported by substantial evidence (J.S. App. A). Appellant's constitutional claim was then referred to a three-judge district court pursuant to 28 U.S.C. 2282 and 2284. That court concluded that the statutory requirement that certain children establish actual dependency as a condition of receiving child's insurance benefits bears a direct and substantial relationship to the statutory purpose of replacing the support lost by a child upon the wage-earner's death (J.S. App. C). This Court vacated and remanded for consideration in light of the intervening decision in Jimenez v. Weinberger, 417 U.S. 629. 418 U.S. 902. The district court, with one judge dissenting, again sustained the constitutionality of the challenged provisions (J.S. App. D).

DISCUSSION

1. We believe that the district court correctly rejected appellant's constitutional claim, for the reasons set forth

in its thorough opinion upon remand. We nevertheless do not oppose the noting of probable jurisdiction. The constitutional issue raised by appellant is important to the administration of the Social Security Act, and we have been informed by the Department of Health, Education, and Welfare that thirteen cases involving this issue are currently pending in the lower federal courts, awaiting disposition of this case. See, e.g., Adams v. Weinberger, decided November 25, 1974, No. 73C-633 (E.D. N.Y.), appeal pending, No. 75-7098 (C.A. 2) (upholding the statute as constitutional). See also Lucas v. Weinberger, decided March 21, 1975, No. 4845 (D.R.I.), notice of appeal filed April 15, 1975 (holding the statute unconstitutional). This case is therefore an appropriate vehicle for resolution of the constitutional issue that appellant has raised.

2. a. In our view, however, the noting of probable jurisdiction should be limited to the constitutional issue. Appellant's statutory claim for relief, i.e., that the district court erred in sustaining the hearing examiner's finding that appellant's father was not living with him or contributing to his support at the time of his death (J.S. 12-13), has no substantial basis in the evidence (see p. 3, supra) and pertains only to appellant and not to the class that he purports to represent. It is, moreover, an issue the consideration of which would logically precede consideration of appellant's constitutional claim. See Ashwander v.

Tennessee Valley Authority, 297 U.S. 288, 346-348 (concurring opinion of Mr. Justice Brandeis). We see no reason why the Court should undertake plenary review of this essentially factual claim. Accordingly, we believe that the judgment of the district court should be affirmed insofar as it sustains the hearing examiner's conclusion that appellant is not statutorily entitled to receive child's insurance benefits. The only question before this Court should be that of the constitutionality of the statutory scheme.

b. At first blush, the recitation of facts (pp. 2-3, supra) might suggest that appellant and the hearing examiner both overlooked a possible statutory basis for awarding child's insurance benefits, i.e., that appellant's father had acknowledged paternity in writing in his letter to Mrs. Evans.[3/] It is true that the hearing examiner did not expressly address that question. But appellant's counsel had urged, in oral argument before the hearing examiner, that the letter to Mrs. Evans was a written acknowledgement of paternity for purposes of the Act (App. 97), and the hearing examiner nevertheless concluded that although appellant had established that Gregory Norton, Sr. was his father, "there is insufficient evidence of record to establish that other

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3/ The letter itself had been destroyed by Mrs. Evans prior to the hearing (App. 49). But "[i]f clear and convincing evidence shows that the [wage earner] timely acknowledged the child in writing, the requirements are met even if the acknowledgement is no longer in existence or cannot be obtained." Paragraph 2428, HEW manual for hearing examiners.

requirements of the Social Security Act were met so as to entitle [appellant] to benefits" (App. 14).[4/] Accordingly, the question whether appellant's father acknowledged his paternity in writing was tried before the hearing examiner and decided against appellant. Appellant did not challenge that determination on his appeal to the district court and does not here contend that he is statutorily entitled to child's insurance benefits on the basis of a written acknowledgement.

CONCLUSION

Probable jurisdiction should be noted with respect to the constitutional issue raised by appellant. The judgment of the district court should be affirmed insofar as it denies appellant's claim to be statutorily entitled to child's insurance benefits.

ROBERT H. BORK,
Solicitor General.

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4/ Paragraph 2428 of the HEW manual requires that the evidence of a written acknowledgement be "clear and convincing" (see note 3, supra) and that "[t]he writing must identify the child in question by name or otherwise, and must acknowledge or identify the child as the [wage earner's] son or daughter." Appellant offered only hearsay evidence concerning the content of the letter to Mrs. Evans (see App. 49, 87), and the hearing examiner apparently determined that that evidence did not clearly and convincingly establish that appellant's father had explicitly identified appellant as his son.